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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 960

STANDARD KNITTING MILLS, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Of Counsel:
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COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner, Standard Knitting Mills, Inc., prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Sixth Circuit, entered in the above-entitled cause on February 8, 1944, affirming the decision of The Tax Court of the United States, formerly the United States Board of Tax Appeals.

Opinions Below.

The opinion of The Tax Court of the United States is reported at 47 B. T. A. 295 (R. 47). The opinion of the Court below is not yet reported (R. 142).

Jurisdiction.

The judgment of the Court below was entered February 8, 1944 (R. 142). The jurisdiction of this Court is invoked

under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statutes Involved.

These are set forth in the Appendix, p. 9.

Statement of the Case.

This case involves unjust enrichment taxes under Title III of the Revenue Act of 1936 (c. 690, 49 Stat. 1734, 26 U. S. C. A. — I. R. C. § 700).

The petitioner is a Tennessee corporation, organized in 1900 with its principal place of business in Knoxville, Tennessee. It is engaged in the business of spinning cotton into yarn and knitting underwear and other garments. It was subject to the provisions of the Agricultural Adjustment Act which imposed a processing tax of 4.2 cents per pound on the processing of lint cotton (R. 48).

Because of the tax imposed but not paid for the year 1935, the petitioner filed unjust enrichment tax returns. The first, a tentative return, showed an estimated tax of $5000. The second, a completed return filed February 13, 1937, showed an unjust enrichment tax liability of $38,538.69 (R. 49). The respondent determined that the tax should be $60,200.70, and issued a notice of deficiency showing a deficiency of $21,662.01 (R. 17), from which the petitioner appealed to the Board of Tax Appeals (now The Tax Court) December 13, 1939 (R. 6).

The Board found that a comparison of statutory margins per pound under Section 501(c) of the 1936 Act showed the following (R. 56):

Margin in taxable year 1935	$ .325653141
Average margin 1927-1932	.270777453
Excess margin	$ .054875688

The Board also found that the excess costs of production during the tax period over the base period were $.028528261 per pound (R. 75). To determine the actual extent to which the statutory presumption was rebutted under Section 501(i)(1), the normal and natural procedure would be to subtract the increased costs of production of $.028528261 per lb. from the excess margin of $.054875688 per lb. and arrive at the result $.026347427 per lb. as being the actual extent to which the tax was passed on to others.[1] Instead, however, the Board applied a mathematical formula[2]; and arrived at $.032678799 (R. 75). In the instant case the difference in unjust enrichment tax liability between making the simple subtraction (as was done in the *Regensburg* case with the approval of the Second Circuit), and using the formula (as approved by the Sixth Circuit in the instant case), is approximately $9100.[3]

The Board also made the following findings of fact, but failed to implement such findings by treating them as factors in rebuttal of the statutory presumption under Section 501(i)(1) and, consequently, made no finding as to the actual extent to which such factors established that petitioner has borne the burden of the tax:

1. "During the years 1927 to 1932, inclusive, hereinafter referred to as the base period, petitioner's cotton mill, with

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[1] This is precisely what was done in *E. Regensburg & Sons* v. *Commissioner* (C. C. A. 2, 130 F. (2d) 507); also in *Commissioner* v. *E. Regensburg & Sons* (C. C. A. 2, 139 F. (2d) 883).

[2] The principal point on appeal in *Commissioner* v. *Regensburg, supra*, was the failure to use such a formula. In the Government's brief in that case (p. 24) it is urged:

"The Board of Tax Appeals (now The Tax Court of the United States) has also approved this principle of apportionment in unjust enrichment tax cases arising under Section 501 of the Revenue Act of 1936. See *Stockton* v. *Commissioner*, 44 B. T. A. 514; *Standard Knitting Mills, Inc.* v. *Commissioner*, 47 B. T. A. 295 (on appeal) (C. C. A. 6th)."

[3] In the *Regensburg* case, according to the Government's brief (pp. 22, 25) the difference was $24,560.52 ($36,579.42 minus $12,018.90).

the exception of a portion of 1932, produced coarse carded yarn exclusively, which yarn it knitted into fabric for heavy winter weight garments. It had been making this type of garment for many years *and had practically exhausted means of reducing costs of manufacture by more efficient production methods.* No new style elements could be introduced to increase the demand for the garments. About 1929 the consuming public commenced to demand lightweight underwear and petitioner was required to meet the demand or run the risk of being required to discontinue business. From 1932 to 1935 there was a gradual trend towards slightly lighter weight fabric for underwear. In 1927 about 99 per cent of the petitioner's production consisted of heavyweight garments which were sold on the basis of weight for warmth. The amount decreased to about 40 per cent in 1932 and to about 27 per cent in 1935. *Competition in the heavyweight underwear market increased each year during this period and rendered the business less profitable to petitioner* (R. 50). (Emphasis supplied)

2. "Heavyweight union suits and drawers were the only types of garments manufactured by petitioner during both the base period and in 1935, i.e., common to both periods. *Petitioner did not manufacture any athletic shirts in 1927 and 1928. It produced an experimental quantity in 1929 and attained full commercial production of the garment in 1931. In 1935 about 60 per cent of the garments produced by petitioner were athletic shirts.* Petitioner did not manufacture polo shirts during the base period. It produced 9,352 dozens of that garment in 1935 (R. 50-51). (Emphasis supplied)

3. "Petitioner's employees had to be trained to produce athletic shirts and it was required to develop other means of producing the garments efficiently. Petitioner had devised means of reducing the pounds of material required per

dozen of lightweight garments and the development of high speed sewing machines decreased finishing costs. *These and other savings enabled petitioner to increase its profits per dozen notwithstanding decreased selling prices for the garments* (R. 51). (Emphasis supplied)

4. "The labor costs of the petitioner in 1935 were greater than during the base period on account of provisions of the National Recovery Act enacted in 1933 (R. 51).

5. "The processing taxes imposed upon the petitioner in 1933 were shifted to its customers by adding the taxes as a separate item on invoices. Price lists of petitioner for the fall season of 1934 contained a statement that the price named therein included the processing tax. The desire and intention of the petitioner at that time was to pass the tax on to its customers. Early in 1935 there were pending in various Federal courts suits contesting the validity of the Agricultural Adjustment Act *and by that time customers of petitioner were not disposed to pay processing taxes imposed by the act.* The price list of petitioner for the fall season in 1935 contained nothing about processing taxes (R. 51). (Emphasis supplied)

6. "Petitioner's prices for articles prevail for the entire season unless some important element requires them to be changed. Reductions in selling price generally result in refunds on prior sales during the season. Advances in prices are not retroactive. *More efficient operating methods enabled petitioner to decrease its cost of making lightweight underwear in 1935* (R. 51)."[4] (Emphasis supplied)

The Court below affirmed the decision of The Tax Court and, in doing so, pointedly omitted any discussion of pe-

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[4] Failure and refusal to give effect to similar rebutting factors was the occasion for the reversal and remanding of the case in *E. Regensburg & Sons* v. *Commissioner*, 130 F. (2d) 507. In that case, as in the case at bar, the Trial Court had adopted the view that the *only* rebutting factor that could be given effect was that of increased costs of production.

titioner's Points 3 and 4 (R. 86) under which the petitioner urged it to follow the Second Circuit decision in the *Regensburg* case.[5] The reason now becomes apparent.[6]

Other points urged below (Points 1, 2, 5, R. 86-87) are not pressed here.

Questions Presented.

1. Where The Tax Court found that under Section 501(e)(2) there was an excess margin during the tax period of $.054875688 per lb. (indicating that the tax of $.042 per lb. had presumptively been shifted to others), but further found that the increased costs of production during the tax period (over the base period) represented $.028528261 per lb., how are the rebuttal provisions of Section 501(i)(1) to be applied?

2. Where The Tax Court found a marked change in character of the predominant garment manufactured between the base period and the tax period and where it found further (1) that petitioner had devised means of reducing the pounds of material required per dozen garments, (2) that through development of high speed sewing machines it had decreased its finishing costs, and (3) that these and other savings enabled petitioner to increase its profits per dozen notwithstanding decreased selling prices, —are these factors to be considered under Section 501(i)(1) in rebuttal of the statutory presumption?

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[5] 130 F. (2d) 507.

[6] As shedding light on the reason why the Sixth Circuit, in this case, refused to follow the Second Circuit in the *Regensburg* case, the recent decision of the Sixth Circuit in *Cornett-Lewis Coal Co.* v. *Com'r.*, — F. (2d) — (decided April 12, 1944, 44 C. C. H. P. 9281) is illuminating. There, after stating a contention urged as to the meaning of "presumed" in the statute, citing *E. Regensburg & Sons* v. *Helvering*, 130 F. (2d) 507 (C. C. A. 2), the opinion makes the blunt statement, "*We think this view is erroneous.*" (Emphasis supplied)

Specification of Errors to be Urged.

The Court below erred:

1. In affirming The Tax Court's holding that Section 501(i)(1) requires the use of a complicated mathematical formula to determine the extent to which the increased costs of production during the tax period rebutted the statutory presumption under Section 501(e) of the 1936 Act.

2. In affirming The Tax Court's failure to give effect, as rebuttal evidence under Section 501(i)(1), to the factors which The Tax Court found as to (1) change in character of the garments, (2) reduction in costs through savings in material, (3) reduction in costs through development of high speed sewing machines and (4) the resulting increase in profits notwithstanding decreased selling prices of garments.

3. In affirming The Tax Court's decision that the petitioner shifted to others the burden of the processing tax to the extent of $70,702.12, and that there was a resulting deficiency in unjust enrichment tax for the year 1935 of $8,301.47.

Reasons for Granting the Writ.

The decision below is directly opposed to the construction of identical provisions of the law by the Second Circuit in *E. Regensburg & Sons* v. *Commissioner,* 130 F. (2d) 507, and *Commissioner* v. *E. Regensburg & Sons,* 139 F. (2d) 883. The Court below, in fact, in referring to the first *Regensburg* decision[7] in another case,[8] stated, "*We think this view is erroneous.*" The Second Circuit rule fully supports the petitioner as to each specification of error,

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[7] 130 F. (2d) 507.

[8] *Cornett-Lewis Coal Co.* v. *Commissioner,* — F. (2d) —, decided April 12, 1944.

supra. Such a conflict between circuits warrants the exercise by this Court of its power of review under its rules (Rule 38, par. 5(b)).

The decision below ignores the admonitions of this Court, with respect to the consideration and effect which should be given to evidence in rebuttal of the statutory presumption, as stated in *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 351, 355-356. The narrow and stilted construction of Section 501(i)(1) of the 1936 Act by the Court below results in penalizing the taxpayer for its efficiency and in denying due process.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Of Counsel:

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April, 1944.

APPENDIX.

Title III of the Revenue Act of 1936 (c. 690, 49 Stat. 1734, 26 U. S. C. A., I. R. C. § 700), so far as is pertinent, reads as follows:

TITLE III—TAX ON UNJUST ENRICHMENT.

Sec. 501. Tax on Net Income from Certain Sources.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

* * * * * * *

(e) For the purposes of subsection (a) (1), (2), and (3), the extent to which the taxpayer shifted to others the burden of a Federal excise tax shall be presumed to be an amount computed as follows:

* * * * * * *

(2) If the taxpayer so elects by filing his return on such basis, from the aggregate selling price of all articles with respect to which such Federal excise tax was imposed and which were sold by him during the taxable year (computed without deduction of reimbursement to purchasers with respect to such Federal excise tax) there shall be deducted the aggregate cost of such articles, and the difference shall be reduced to a margin per unit in terms of the basis on which the Federal excise tax was imposed. The excess of such margin per unit over the average margin (computed for the same unit) shall be multiplied by the

number of such units represented by the articles with respect to which the computation is being made; but

* * * * * * *

(i) Either the taxpayer or the Commissioner may rebut the presumption established by subsection (e) by proof of the actual extent to which the taxpayer shifted to others the burden of the Federal excise tax. Such proof may include, but shall not be limited to:

(1) Proof that the change or lack of change in the margin was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or materials, or (B) in cost of production. If the taxpayer asserts that the burden of the tax was borne by him while the burden of any other increased cost was shifted to others, the Commissioner shall determine, from the respective effective dates of the tax and of the other increase in cost as compared with the date of the change in margin, and from the general experience of the industry, whether the tax or the increase in other cost was shifted to others. If the Commissioner determines that the change in margin was due in part to the tax and in part to the increase in other cost, he shall apportion the change in margin between them.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 960

STANDARD KNITTING MILLS, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 142–148) is reported at 141 F. (2d) 195. The findings of fact and opinion of the Board of Tax Appeals (now The Tax Court of the United States) (R. 47–76) are reported at 47 B. T. A. 295.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 8, 1944 (R. 142). The petition for a writ of certiorari was filed on May 3, 1944. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the court below properly held that in determining the "actual extent" to which the taxpayer shifted the burden of an unpaid federal excise tax, and thereby became liable for the tax imposed by Section 501 (a) (1) of the Revenue Act of 1936, the increase in its statutory "margin" for the taxable year over its "average margin" for the base period should be apportioned between the unpaid federal excise tax and the increase in other costs during the tax period.

2. Whether the findings of the Tax Court relating to the taxpayer's business operations over a period of years warranted its conclusion that the taxpayer did not shift the burden of any part of the unpaid federal excise tax.

STATUTE INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 10–19.

STATEMENT

This proceeding was instituted before the Board of Tax Appeals for redetermination of a tax deficiency for the year 1935 asserted against Standard Knitting Mills, Inc., a Tennessee corporation (hereafter referred to as the taxpayer), under authority of Section 501 (a) (1) of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (Ap-

pendix, *infra,* p. 10). That section imposes a tax equal to 80 per centum thereof upon the net income of every individual which arises "from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax". The income subject to the tax thus imposed may not exceed the taxpayer's net income for the entire taxable year from the sale of articles with respect to which the particular federal excise tax was imposed.

The statute provides alternative methods for computing the net income from sales of articles with respect to which the unpaid excise tax was imposed (Section 501 (c), Appendix, *infra,* p. 11), and also provides alternative methods for computing the "presumed" extent to which the taxpayer derived income by shifting to others the burden of the unpaid excise tax (Section 501 (e) (1) and (2), Appendix, *infra,* pp. 12–13). The "presumed" extent to which the taxpayer derived income by shifting to others the burden of the unpaid excise tax may not exceed, however, the amount of the unpaid tax (Section 501 (e) (3), Appendix, *infra,* p. 13). After the presumed extent to which income was so derived has been computed, either the taxpayer or the Commissioner may overcome this presumption by proving the "actual extent" to which the burden of the unpaid tax was shifted (Section 501 (i), Appendix, *infra,* p. 15).

During the entire period material to this proceeding the taxpayer was engaged in the business of spinning cotton into yarn and knitting underwear and other garments. As such it was subject to the Agricultural Adjustment Act, including the provisions imposing a tax upon the first domestic processing of cotton. (R. 48–49.) The taxpayer paid the tax imposed under that Act until about April, 1935, when it obtained an injunction enjoining the Collector from collecting the tax. Thereafter it deposited in escrow the sum of $95,-896.29 for processing taxes for the months of April to August 1935 inclusive. The sum of $64,149.42 which would have been payable for the months of September to December 1935, inclusive, was not paid or placed in escrow. (R. 52.)

It is this unpaid processing tax of $160,045.71 which gives rise to the present controversy concerning the taxpayer's unjust enrichment tax liability under Section 501 (a) (1) for the year 1935. The taxpayer first filed a tentative unjust enrichment tax return, and later filed a completed return for 1935 showing an unjust enrichment tax liability of $38,538.69, which subsequently was paid with interest (R. 49). Upon audit of this return the Commissioner of Internal Revenue determined a deficiency of $21,662.01 in the taxpayer's unjust enrichment tax liability (R. 17–42). The Board of Tax Appeals redetermined a deficiency in the sum of $8,301.47 (R. 84–85). The taxpayer appealed to the Circuit Court of

Appeals for the Sixth Circuit (R. 85–87), which affirmed the Board's decision in all respects (R. 142–148).

The Commissioner's determination of the taxpayer's liability for unjust enrichment tax (R. 17–42) was made in accordance with the alternative method of computation prescribed in Section 501 (e) (2) of the 1936 Act (R. 52, 59, 70), which provides that the extent to which a taxpayer derived income by shifting to others the burden of an unpaid federal excise tax shall be determined by deducting from the aggregate selling price of all articles sold during the year with respect to which the federal excise tax was imposed the aggregate cost of such articles and reducing the result to a "margin per unit in terms of the basis on which the Federal excise tax was imposed." The excess of such margin per unit over the "average margin" (computed for the same unit) is then multiplied by the number of such units represented by the articles with respect to which the computation is being made (Section 501 (e) (2)). The statute then defines "cost", "selling price", "margin", and "average margin" as used in connection with this computation (Section 501 (f) (Appendix, *infra,* p. 13)).

In this case the taxpayer sought to rebut this presumption, as it was permitted to do under the statute, by proof of the "actual extent" to which it shifted the burden of the unpaid processing tax. Several issues were presented to the Board. The

Board made extensive and detailed findings of fact (R. 48–56), and wrote an elaborate opinion (R. 57–76) dealing with the questions involved. The Board found, *inter alia,* that the taxpayer's "average margin" per unit in the base period was $0.270777453 per pound lint cotton processed, that its "margin" per unit in the tax period was $0.325653141 per pound of lint cotton processed, and that its "margin" per unit for the tax period exceeded its "average margin" for the base period by $0.054875688 (R. 56).

This excess in "margin" for the tax period was more than the unpaid processing tax of $0.042 per pound; hence under the statute it was presumed that the burden of the full amount of unpaid processing tax had been shifted. In actual figures the Board found that the correct amount of unpaid processing tax for the period from April 1, 1935, through the close of the year was $90,868.97, but that on the basis of the statutory margin comparison it was "presumed" that the taxpayer had realized income in the sum of $118,726.13 which was attributable to shifting to others the burden of the unpaid processing tax (R. 56).

However, as part of its rebuttal proof the taxpayer proved that its expenses, other than cost of material, had increased $0.028528261 per pound during the tax period as compared with such expenses for the base period (R. 56). The unpaid processing tax and the increased expenses thus

amounted to $0.070528261 in the tax period as compared with an increase in "margin" of $0.054875688 (R. 56). Consequently, the increase in "margin" for the tax period was not sufficient to permit the taxpayer to recover all of its increase in expenses and to shift the burden of the full amount of unpaid processing tax.

The Board further found as a fact that the "increased margin in the taxable year over the base period was due, proportionately both to the processing tax of $0.042 per unit and to the increase of $0.028528261 in other cost, a total of $0.070528261 per unit" (R. 56). On the basis of this finding the Board apportioned the increase in margin between the unpaid processing tax and the increase in other costs, as provided in Section 501 (i) (1) of the Act, and concluded that the taxpayer had shifted the burden of the unpaid processing tax to the extent of $70,702.12 (R. 56). These findings and conclusions were upheld by the Circuit Court of Appeals (R. 142–148).

ARGUMENT

The taxpayer advances two contentions as grounds for granting certiorari in this case (Pet. 7–8). We submit that both are without merit.

1. The decision below is not in conflict with the holding of the Circuit Court of Appeals for the Second Circuit in *E. Regensburg & Sons* v. *Helvering,* 130 F. 2d 507, and *Helvering* v. *E. Regensburg & Sons,* 139 F. 2d 883. In its first opinion

in that case (130 F. 2d 507) the Circuit Court of Appeals indicated its approval of the principle of allocating the increase in margin proportionately between the tax and increased costs of production, as provided in the statute which was there involved. However, no question of allocation was involved at that stage of litigation. On remand, the Processing Tax Board of Review made additional findings at the direction of the appellate court, and concluded that the taxpayer had borne the burden of the full amount of processing tax paid by it. That Board made no finding, such as was made by the Board of Tax Appeals in this case, that the increase in margin was due proportionately to the imposition of the tax and to the increase in other costs during the tax period. In other respects the factual situation there was similar to the instant case. The processing tax and the increase in cost of production exceeded the increase in margin for the tax period. The principal question raised by the Commissioner on the second appeal was whether the Processing Tax Board of Review had erred in not allocating the increase in margin proportionately between processing tax and the increase in cost of production. The Circuit Court of Appeals held in effect that the Board of Review had in fact found that no part of the increase in margin was due to the shifting of the tax. 139 F. (2d) 883.

2. The court below and the Board of Tax Appeals did not err, as the taxpayer contends (Pet.

7, 8), in failing to give effect to the Board's findings as to change in character of garments, reduction in cost through savings in material, reduction in cost through development of high-speed sewing machines, and resulting increase in profits notwithstanding decreased selling prices. The opinions of both the Board and the Circuit Court of Appeals show these findings were fully justified by the evidence. And there is nothing in the record to show that these factors had any greater effect upon taxpayer's margins than that given them by the Board. In any event, questions as to the weight and significance to be given evidence in a particular case before the Tax Court do not warrant further review by this Court. Cf. *Dobson* v. *Commissioner,* 320 U. S. 489.

CONCLUSION

The decision below is correct. There is no conflict of decisions, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1944.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 501. TAX ON NET INCOME FROM CERTAIN SOURCES.

(a) The following taxes shall be levied, collected, and paid for each taxable year (in addition to any other tax on net income), upon the net income of every person which arises from the sources specified below:

(1) A tax equal to 80 per centum of that portion of the net income from the sale of articles with respect to which a Federal excise tax was imposed on such person but not paid which is attributable to shifting to others to any extent the burden of such Federal excise tax and which does not exceed such person's net income for the entire taxable year from the sale of articles with respect to which such Federal excise tax was imposed.

(2) A tax equal to 80 per centum of the net income from reimbursement received by such person from his vendors of amounts representing Federal excise-tax burdens included in prices paid by such person to such vendors, to the extent that such net income does not exceed the amount of such Federal excise-tax burden which such person in turn shifted to his vendees.

(3) A tax equal to 80 per centum of the net income from refunds or credits to such person from the United States of Federal excise taxes erroneously or illegally collected with respect to any articles, to the extent that such net income does not exceed

the amount of the burden of such Federal excise taxes with respect to such articles which such person shifted to others.

(b) The net income (specified in subsection (a) (1)) from the sale of articles with respect to which the Federal excise tax was not paid, and the net income specified in subsection (a) (2) or (3), shall not include the net income from the sale of any article, from reimbursement with respect to any article, or from refund or credit of Federal excise tax with respect to any article (1) if such article (or the articles processed therefrom) were not sold by the taxpayer on or before the date of the termination of the Federal excise tax; (2) if the taxpayer made a tax adjustment with respect to such article (or the articles processed therefrom) with his vendee; or (3) if under the terms of any statute the taxpayer would have been entitled to a refund from the United States of the Federal excise tax with respect to the article otherwise than as an erroneous or illegal collection (assuming, in case the tax was not paid, that it had been paid).

(c) The net income from the sales specified in subsection (a) (1) shall be computed as follows:

(1) From the gross income from such sales there shall be deducted the allocable portion of the deductions from gross income for the taxable year which are allowable under the applicable Revenue Act; or

(2) If the taxpayer so elects by filing his return on such basis, the total net income for the taxable year from the sale of all articles with respect to which each Federal excise tax was imposed (computed by deducting from the gross income from such sales the allocable portion of the deduc-

tions from gross income which are allowable under the applicable Revenue Act, but without deduction of the amount of such Federal excise tax which was paid or of the amount of reimbursement to purchasers with respect to such Federal excise tax) shall be divided by the total quantity of such articles sold during the taxable year and the quotient shall be multiplied by the quantity of such articles involved in the sales specified in subsection (a) (1). Such quantities shall be expressed in terms of the unit on the basis of which the Federal excise tax was imposed.

For the purposes of this section the proper apportionment and allocation of deductions with respect to gross income shall be determined under rules and regulations prescribed by the Commissioner with the approval of the Secretary.

(d) The net income from reimbursement or refunds specified in subsection (a) (2) or (3) shall be computed as follows: From the total payment or accrual (1) of reimbursement to the taxpayer from vendors for amounts representing Federal excise tax burdens included in prices paid by the taxpayer to such vendors or (2) of refunds or credits to the taxpayer of Federal excise taxes erroneously or illegally collected, there shall be deducted the expenses and fees reasonably incurred in obtaining such reimbursement or refunds.

(e) For the purposes of subsection (a) (1), (2), and (3), the extent to which the taxpayer shifted to others the burden of a Federal excise tax shall be presumed to be an amount computed as follows:

(1) From the selling price of the articles there shall be deducted the sum of (A) the cost of such articles plus (B) the average

margin with respect to the quantity involved; or

(2) If the taxpayer so elects by filing his return on such basis, from the aggregate selling price of all articles with respect to which such Federal excise tax was imposed and which were sold by him during the taxable year (computed without deduction of reimbursement to purchasers with respect to such Federal excise tax) there shall be deducted the aggregate cost of such articles, and the difference shall be reduced to a margin per unit in terms of the basis on which the Federal excise tax was imposed. The excess of such margin per unit over the average margin (computed for the same unit) shall be multiplied by the number of such units represented by the articles with respect to which the computation is being made; but

(3) In no case shall the extent to which the taxpayer shifted to others the burden of the Federal excise tax with respect to the articles be deemed to exceed the amount of such tax with respect to such articles minus (A) the portion of the amount of the Federal excise tax (or of the reimbursement specified in subsection (a) (2)) with respect to the articles which is paid or credited by the taxpayer to any purchasers as specified in subsection (f) (3) and minus (B) the amount of any increase in the tax under section 602 of the Revenue Act of 1932 for which the taxpayer under this section became liable as the result of the nonpayment or refund of the Federal excise tax with respect to the articles.

(f) As used in this section—

(1) The term "margin" means the difference between the selling price of articles and the cost thereof, and the term "aver-

age margin" means the average difference between the selling price and the cost of similar articles sold by the taxpayer during his six taxable years preceding the initial imposition of the Federal excise tax in question, except that if during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are so inadequate as not to furnish satisfactory data, the average margin of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average margin, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced.

(2) The term "cost" means, in the case of articles manufactured or produced by the taxpayer, the cost to the taxpayer of materials entering into the articles; or, in the case of articles purchased by the taxpayer for resale, the price paid by him for such articles (reduced in both cases by the amount for which he is reimbursed by his vendor).

(3) The term "selling price" means selling price minus (A) amounts subsequently paid or credited to the purchaser on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936, as reimbursement for the amount included in such price on account of a Federal excise tax; and minus (B) the allocable portion of any professional fees and expenses of litigation incurred in securing the refund or preventing the collection of the Federal excise tax, not to exceed 10 per centum of the amount of such tax.

(g) In determining costs, selling prices, and net income, the taxpayer shall, unless otherwise shown, be deemed to have sold articles in the order in which they were manufactured, produced, or acquired. Where the taxpayer's records do not adequately establish the quantity of a commodity taxable under the Agricultural Adjustment Act, as amended, entering into articles sold by him, such quantities shall be computed by the use of the conversion factors prescribed in regulations under such Act, as amended.

(h) If the taxpayer made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(i) Either the taxpayer or the Commissioner may rebut the presumption established by subsection (e) by proof of the actual extent to which the taxpayer shifted to others the burden of the Federal excise tax. Such proof may include, but shall not be limited to:

(1) Proof that the change or lack of change in the margin was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or materials, or (B) in costs of production. If the taxpayer asserts that the burden of the tax was borne by him while the burden of any other increased cost was shifted to others, the Commissioner shall determine, from the respective effective dates of the tax and of the other increase in cost as

compared with the date of the change in margin, and from the general experience of the industry, whether the tax or the increase in other cost was shifted to others. If the Commissioner determines that the change in margin was due in part to the tax and in part to the increase in other cost, he shall apportion the change in margin between them.

(2) Proof that the taxpayer modified contracts of sale, or adopted a new contract of sale, to reflect the initiation, termination, or change in amount of the Federal excise tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the taxpayer may establish that such acts were caused by factors other than the tax, or that they do not represent his practice during the period in which the articles in question were sold.

(j) As used in this section—

(1) The term "Federal excise tax" means a tax or exaction with respect to the sale, lease, manufacture, production, processing, ginning, importation, transportation, refining, recovery, or holding for sale or other disposition, of commodities or articles, provided for by any Federal statute, whether valid or invalid, if denominated a "tax" by such statute. A Federal excise tax shall be deemed to have been imposed with respect to

an article if it was imposed with respect to (or with respect to the processing of) any commodity or other article, from which such article was processed.

(2) The term "date of the termination of the Federal excise tax" means, in the case of a Federal excise tax held invalid by a decision of the Supreme Court, the date of such decision.

(3) The term "refund or credit" does not include a refund or credit made in accordance with the provisions and limitations set forth in Title VII of this Act, or in section 621 (d) of the Revenue Act of 1932.

(4) The term "tax adjustment" means a repayment or credit by the taxpayer to his vendee of an amount equal to the Federal excise tax with respect to an article (less reasonable expense to the vendor in connection with the nonpayment or recovery by him of the amount of such tax and in connection with the making of such repayment or credit) if such repayment or credit is made on or before June 1, 1936, or thereafter in the bona fide settlement of a written agreement entered into on or before March 3, 1936.

(5) The term "taxpayer" means a person subject to a tax imposed by this section.

(k) All references in this section to the purchase or sale (or to parties to the sale) of articles with respect to which a Federal excise tax was imposed shall be deemed to include the purchase or sale (or parties to the sale) of services with respect to which a Federal excise tax was imposed, and for the purposes of subsection (a) the extent to which the taxpayer shifted to others the burden of such Federal excise tax with respect to such services shall be presumed to

be an amount computed as follows: From the selling price of the services there shall be deducted the average price received by the taxpayer for performing similar services during the six taxable years preceding the initial imposition of the Federal excise tax in question. The balance (to the extent that it does not exceed the amount of such Federal excise tax with respect to such services minus any payments or credits with respect to the services made to purchasers as specified in subsection (f) (3)) shall be the extent to which the taxpayer shifted the burden of such Federal excise tax to others. If during any part of such six-year period the taxpayer was not in business, or if his records for any part of such period are so inadequate as not to furnish satisfactory data, the average price of the taxpayer for such part of such period shall, when necessary for a fair comparison, be deemed to be the average price, as determined by the Commissioner, of representative concerns engaged in a similar business and similarly circumstanced. The presumption established by this subsection may be rebutted by proof of the character described in subsection (i).

(l) The taxes imposed by subsection (a) shall be imposed on the net income from the sources specified therein, regardless of any loss arising from the other transactions of the taxpayer, and regardless of whether the taxpayer had a taxable net income (under the income-tax provisions of the applicable Revenue Act) for the taxable year as a whole; except that if such application of the tax imposed by subsection (a) is held invalid, the tax under subsection (a) shall apply to that portion of the taxpayer's en-

tire net income for the taxable year which is attributable to the net income from the sources specified in such subsection.

SEC. 502. CREDIT FOR OTHER TAXES ON INCOME.

There shall be credited against the total amount of the taxes imposed by this title an amount equivalent to the excess of—

(a) The amount of the other Federal income and excess-profits taxes payable by the taxpayer for the taxable year, over

(b) The amount of the other Federal income and excess-profits taxes which would have been payable by the taxpayer for the taxable year if his net income were decreased by the amount of net income taxable under this title.

SEC. 504. TAXABLE YEARS TO WHICH TITLE IS APPLICABLE.

The taxes imposed by this title shall apply only with respect to taxable years ending during the calendar year 1935 and to subsequent taxable years.

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